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SPECIAL OFFICE IN EUROPE

ORGANISATION FOR ECONOMIC  
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## 71996 – PERU

### Regulation of concentrations of enterprises

#### Background to the reform

Experience of the application of Peruvian legislation on protection of competition goes back over a decade, since the current Protection of Competition Act, Legislative Decree No. 701, was approved in November 1991.

Legislative Decree No. 701 does not envisage a general system of regulation of economic concentrations, but was intended solely to control behaviour, i.e. prevention of collusion and abuse of dominant market position.

In November 1977, the policy of regulation of structures was introduced in Peruvian legislation on protection of competition, but confined only to the electricity sector. In that respect, only the electricity sector has a system of regulation of concentrations by virtue of the provisions of Law No. 26876, the Anti-monopoly and Anti-oligopoly (Electricity Sector) Act.

The Protection of Competition Bill presented by INDECOPI for public discussion at the end of 2004 seeks to fill the current gap in Peruvian legislation regarding the policy on regulation of structures, by extending regulation of economic concentrations to all sectors of the national economy. The Bill includes a procedure for regulation or authorisation of transactions involving enterprise concentrations, both horizontal and vertical, as a mechanism for protecting competition by prior analysis of future economic structures which are going to be created in a market as a result of such transactions.

#### Arguments for and against implementation of a general system of regulation of economic concentrations.

Regulation of concentrations of enterprises is justified by the possibility of concentration transactions which can cause problems to competition by establishing market structures which limit or restrict competition to the detriment of consumers. Furthermore, by definition, a concentration transaction reduces the number of participants in the market in question, which reduces transaction costs and increases the probability of generating anti-competitive practices. The reduction in competition resulting from the concentration of economic power in a smaller number of business units places them in a better position to engage in actions which may affect the general economic interest, including the well-being of consumers.

At present there are many countries which have incorporated regulation of structures as an instrument of their policy of protecting competition, and it should be noted that the implementation of systems of regulation of economic concentrations is on the increase world wide.

Notwithstanding the above, in Peru there is opposition to extending the system of regulation of economic concentrations. However paradoxical, the main argument of those who defend this opposition is based on the right of freedom of enterprise, which could be impaired by the regulation of mergers and acquisitions.

Despite the opposition mentioned in the previous paragraph, when evaluating the performance and opportunities of Peru's competition policy, a body as serious and technical as the OECD could analyse the arguments against and emphatically dismiss them in the following terms:

- “An old argument was that regulation of mergers and acquisitions could be harmful in small and open economies in which national firms may need to merge to achieve economies of scale to compete effectively against foreign firms. This argument has been discredited, and it is generally recognised from empirical experience that regulation of mergers does not prevent such mergers.
- It was said that systems of prior notification imposed high costs on governments and companies. In fact, such systems may be costly, but the cost can be minimised by setting high reporting thresholds.
- The third argument was that given that the analysis of fusions and mergers is particularly complex, there is an excessive risk that the competition authorities will take incorrect decisions. The premise of this argument is questionable, and in any case the argument has lost much of its validity now that INDECOPI has been operating for over 10 years and has some experience of mergers analysis.
- The fourth and final argument is that the complexity of mergers analysis allows discretionarity which can be used to control the economy in ways which are not consistent with the economic reform programme [...]. However, it must be remembered that this risk exists in all countries, and international experience provides methods to deal with it. Political interference is generally tackled by giving decision-making authority to independent quasi-judicial agencies or the Judicial Power, implementing transparent procedures and policies based on principles, and providing for judicial review of specific cases and legislative supervision of the agency's policies.”<sup>1</sup>

The importance of the analysis done by OECD lies in the fact that it was carried out months before the presentation of the INDECOPI Bill to extend regulation of economic concentrations.

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<sup>1</sup> Peer review, competition law in Peru, OECD, June 2004

It is time to move away from speculative discussion and bring the country in line with world legislation. This requirement, moreover, is a necessity at a time when Peruvian trade policy is directed towards signing separate free trade treaties, as a result of which our economy will be exposed to the economic action of large investment groups which, in turn, are subject in their own countries to mechanisms similar to those it is sought to implement in Peru.